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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NO. 168

THE UNITED STATES, PETITIONER

vs.
PEWEE COAL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 20, 1950
CERTIORARI GRANTED OCTOBER 2, 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 168

THE UNITED STATES, PETITIONER

vs.

PEWEE COAL COMPANY, INC.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CLAIMS**

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1 In the Court of Claims of the United States

No. 46541

PEWEE COAL COMPANY, INCORPORATED

v.

THE UNITED STATES

Petition

Filed Sept. 4, 1945

To the honorable the Court of Claims:

The plaintiff, Pewee Coal Company, Incorporated, respectfully represents that:

I

The plaintiff is, and at all times mentioned herein has been, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business in the city of Knoxville, Tennessee, and engaged in the business of mining and marketing bituminous coal.

2

II

On May 1, 1943, the plaintiff was the owner and operator of, and had the sole and lawful use, possession, and control of, a bituminous coal mine known as and called Pewee mine, Mine Index No. 605, located at Garland, Campbell county, Tennessee.

III

On May 1, 1943, the United States, through the Secretary of the Interior, under the authority of Executive Order No. 9340, dated May 1, 1943 (8 FR 5695), seized and took from the plaintiff without its consent the entire use, possession, and control of Pewee mine.

IV

From May 1, 1943, continuously to and including October 12, 1943, the United States, through the Secretary of the Interior and the Solid Fuels Administrator for War, used, possessed, controlled, and operated Pewee mine.

V

The cost of operating Pewee mine, during the period of use, possession, control, and operation of the mine by the United

States, as aforesaid, exceeded the receipts and income derived from such operation by the amount of \$42,539.23, which loss the United States has wrongfully required the plaintiff to bear. As a result of the use, possession, control, and operation of Pewee mine by the United States, the plaintiff therefore suffered loss and damage in the amount of \$42,539.23.

VI

The plaintiff claims from the defendant the sum of \$42,539.23, with interest, as compensation for the loss and damage sustained by the plaintiff by reason of the use, possession, control, and operation of Pewee mine by the United States.

VII

The claim herein is made under and based upon the following, among other, provisions of law:

Amendment 5, Constitution of the United States Judicial Code, Section 145.

VIII

No other action has been had upon the claim herein in Congress or by any of the departments or by any other agency of the United States. The plaintiff avers that it has at all times borne true allegiance to the Government of the United States and has at no time in any way aided, abetted, or given encouragement to rebellion against the said Government; that the plaintiff is the sole owner of the claim herein; and that no part of the claim has ever been sold, assigned, or discharged. The plaintiff is justly entitled to recover the amount herein claimed from the United States after allowing all just credits and offsets.

WHEREFORE, the plaintiff prays judgment against the United States in the sum of \$42,539.23, with interest, and for such other and further relief as the nature of the case may require and to the Court may seem just and proper.

PEWEE COAL COMPANY,
INCORPORATED,

Plaintiff.

By: /sgd./ ANSELL AND ANSELL,

Its Attorneys.

5

General traverse

Filed October 15, 1945

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S) JOHN F. SONNETT,
Acting Head, Claims Division.

H. W.

S. R. G.

E. E. E.

Argument and submission of case

On October 4, 1949, the case was argued and submitted on merits by Mr. Burr Tracy Ansell for plaintiff, and by Mr. Robert E. Mitchell for defendant.

7

Special findings of fact, conclusion of law and opinion of the court by Whitaker, J. Dissenting opinion by Madden, J.

Filed February 6, 1950

Mr. Burr Tracy Ansell for the plaintiff.

Mr. Robert E. Mitchell, with whom was Mr. Assistant Attorney General H. G. Morison, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following:

Special findings of fact

1. Plaintiff is a corporation organized in August 1939 with an authorized capital stock of \$150,000, and doing business under the laws of the State of Tennessee, with its principal office in the City of Knoxville, Tennessee. It is engaged in the business of mining (by machine methods) and marketing bituminous coal taken from the Pewee mine located at Garland, Campbell County, Tennessee, on property owned chiefly by the Coal Creek Mining and Manufacturing Co., and partly by the East Tennessee Iron and Coal Company, landholding corporations which pooled the acreage of three contiguous tracts and by joint agreement dated November 28, 1939, leased same to plaintiff for a period of 40 years with an option to renew for a further term of 30 years. The coal-mining

property is within Producing District No. 8, established under the Bituminous Coal Act of 1937 (50 Stat. 72), and is identified by Mine Index No. 605. It is served by an extension of the Tennessee Railroad constructed for that purpose under a joint agreement between plaintiff, the railroad, and the Coal Creek Co. On May 1, 1943, plaintiff's authorized and outstanding capital stock was \$200,000.

2. The plaintiff's mine was first opened and developed in 1940. It passed from the development state to production in the early part of 1941. Thereafter it continuously produced coal until April 1943, with the exception of a period in the spring of 1941 when there was a national strike of mine workers.

The coals produced by the plaintiff from its mine were marketed principally in the southeastern United States with a lesser tonnage moving to and across the Great Lakes and with a very small tonnage moving all-rail into the central states. The larger proportion of the coal produced was sold for domestic application (house or space heating) while the remainder (15 percent) was directed to industrial use.

3. Bituminous coal is primarily an industrial and commercial coal. About 43 percent of all energy produced in the United States is derived from it, including four-fifths of the energy used in driving locomotives on Class 1 railroads, about four-fifths of all fuels and energy-producing material used in the production of steel, and more than 50 percent of the energy used in the production of electric power by public utilities. Largely because of its great dependence on machines, the economy of the United States is peculiarly vulnerable to a stoppage in bituminous coal production. Such a stoppage in time of war, if prolonged, could well result in the most serious consequences to the Nation's military effort. At the time of the stoppages herein mentioned, there were about 2,850 bituminous coal mines in this country whose output exceeded 50 tons daily, accounting for some 95 percent of the total weekly production. Of the approximately 450,000 persons then employed in all bituminous coal mines, at least 90 percent were members of the United Mine Workers of America, hereinafter referred to as UMWA.

4. Plaintiff is a member of the Southern Appalachian Coal Operators Association. Its mine laborers, numbering approximately 150 men, are members of District 19, UMWA.

9 These associations were parties to a contract of July 5, 1941, known as the "Southern Wage Agreement," to a subsidiary agreement of October 23, 1941, known as the "Southern Appalachian District Agreement," and to a further agreement of February 11, 1943, known as the "Six-Day Supplemental Agreement,"

hereafter denominated the Wage Agreement. The terms and conditions of employment at plaintiff's mine, as well as at other mines in the Southern Appalachian Group, were governed by said wage agreements during the period from April 1, 1941, to March 31, 1943. For reasons which will shortly appear, there was no contract between the Southern Appalachian Coal Operators' Association and the United Mine Workers from April 1, 1943, until after termination of the period of Government possession here in question, except for a short extension of the 1941-43 contract.

5. When the United States entered the recent war the contracts expiring March 31, 1943, were in effect between the bituminous coal industry and UMWA. Contract-renewal negotiations got under way March 10, 1943, when representatives of the Union and the bituminous coal operators of the Northern Appalachian Region met in New York City. As part of its demands the union sought a wage increase of \$2 per day and a minimum wage of \$8 per day. Its president, John L. Lewis, announced that the miners would challenge the so-called "Little Steel" formula promulgated by the National War Labor Board, which permitted workers in general to receive an increase of up to 15 percent of their January 1, 1941, pay. He claimed the formula was unjustified in view of rising living costs. The northern operators promptly rejected these demands as involving prohibitive additional cost to the industry. On March 12, conferences began with the Southern Wage Operators' Group, and the union made the same demands. In the course of these meetings, Mr. Lewis informed the operators that "without a negotiated contract the miners will not trespass on your property on April 1." On March 19 they proposed extending the existing contracts until April 30, pending continued negotiations, but the union thought negotiations should continue only with the understanding that wage

10 increases or other changes in the terms and conditions of employment would be retroactive to April 1. Maintaining that any changes should become effective "from the date approved and fixed by the governmental agency having jurisdiction," the operators then appealed to the President of the United States for Government intervention. In addition, the northern group asked the National War Labor Board, created by Executive Order No. 9017 of January 12, 1942, for the peaceful adjustment of labor disputes during the war period, to assume jurisdiction and resolve the issue as to the basis upon which work should be continued beyond April 1, pending a new agreement.

On the evening of March 22, 1943, the President of the United States intervened in the negotiations by sending the following telegram to officials of both operators' groups and to the UMWA president:

"The dispute between the United Mine Workers and the Bituminous Operators must be settled like any other labor dispute under the national no-strike agreement of December 26, 1941, by the peaceful means set forth in the Executive Order No. 9017 of January 12, 1942; that is, by collective bargaining, conciliation and final determination, if necessary, by the National War Labor Board.

"From the telegrams I have received from the committees representing the operators and from the press reports of various proposals made at the conference, it is evident that the time remaining before the expiration of the new contract on March 31 is too short. I, therefore, request the mine workers and the operators to follow the plan adopted at my suggestion in 1941, that is, to continue the uninterrupted production of coal under the terms and conditions of existing contracts until the differences that now separate the parties are peacefully and finally resolved with the understanding that if the new agreement includes any wage adjustments, such adjustments shall be computed and applied retroactively from April 1, 1943. If any wage adjustments are made they must, of course, be made in accordance with the Act of October 2, 1942, and Executive Order No. 9250. It would be unfair to the mine workers and to the operators unduly to prolong this period of uncertainty, and I am, therefore, asking everyone concerned to proceed with all speed consistent with the complete and fair-minded settlement of the dispute. If it is referred to agencies of the Government, I shall make the same request of those in charge of such agencies.

11 "If there is a wage adjustment within the standards set forth in the Act of October 2, 1942, and Executive Order No. 9250, the question of undue hardship to individual operators resulting from the agreement to make such adjustments retroactive to April 1, 1943, will be given due consideration by the agencies of Government concerned with costs and prices."

Thereupon the northern operators and UMWA signed an agreement extending negotiations and the existing contract for one month beyond April 1, with the understanding that "any increase in wages or improvement in hours or working conditions later agreed upon" would be retroactive to that date. Later a similar agreement was reached by the union and the southern operators, after the President had sent Dr. John R. Steelman, then Director of the United States Conciliation Service, Department of Labor, to intervene as his personal representative. Negotiations then continued in Dr. Steelman's presence, but agreement was not reached. On April 6, the southern group renewed a previous suggestion that the War Labor Board handle the dispute, and 3

days later officially asked that agency to assume jurisdiction. A similar request was made to the President on April 12. Concurrently the northern group proposed that the existing contract remain in force for the duration of the war.

6. On April 8, 1943, the President issued his so-called "hold-the-line" Executive Order, No. 9328 (8 F. R. 4681), directing, *inter alia*, that the several Government agencies charged with the stabilization of wages and prices authorize no further wage or salary increases except those which were necessary to correct substandards of living and were within the framework of the "Little Steel" formula, that no increases in the ceiling prices of commodities be authorized except to the minimum extent permitted by law, and that excessively high prices be reduced. Although criticizing the order, Mr. Lewis offered to revise the union's wage demands by substituting therefor a guaranteed 6-day week throughout the year, and on April 13 Dr. Steelman made a similar proposal. It was rejected by the operators in both instances. On April 20 the Secretary of the Interior, Harold L. Ickes, joined the conferences in an effort to suggest a compromise solution, but this, too, proved futile. Two days later the Secretary of Labor, as contemplated by Executive Order No. 9017, *supra*, certified the issues to the War Labor Board, stating that collective bargaining had failed, and the Board thereupon took jurisdiction of the dispute. It promptly notified the parties that the existing contract would remain in effect until settlement of the dispute and that any authorized changes would be retroactive to April 1. It scheduled a hearing in the matter for April 24.

The UMWA then announced that the temporary 30-day contract extension was at an end, negotiations with the operators having ceased, and said it no longer considered itself bound to continue the production of coal. Concurrently strikes began in certain bituminous coal mines of the Appalachian Region and by April 26 some 16,000 miners were out. Meanwhile, representatives of both operating groups, but not the union, met with the War Labor Board. After a preliminary hearing, the Board directed that coal production continue under the existing contract, appointed a 3-man panel to start hearings on April 28, and appealed to the UMWA president to halt the work stoppages. However, Mr. Lewis again stated that without a new contract the 450,000 bituminous coal miners would not "trespass" upon coal properties May 1. He also asked the Secretary of Labor to bring about a resumption of direct negotiations with the operators but the Secretary took the position that the War Labor Board should make that decision. The following day the War Labor Board panel

began its hearings. There was still no appearance by the union. Being advised that some 67,000 miners were on strike, the panel recessed in accordance with the Board's established policy that it would not proceed to determine any labor dispute so long as work stoppages continued. Declaring that UMWA had defied its order to halt the strikes, the Board then referred the matter to the President of the United States.

On April 29, 1943, the President sent the following wire to Mr. Lewis and Thomas Kennedy, UMWA secretary-treasurer:

"The controversy between the United Mine Workers of America and the operators of the coal mines has been certified to the National War Labor Board for settlement.

13 "The officials of the United Mine Workers were invited by the Board to recommend a person for appointment to the panel charged with investigating the facts. They ignored the invitation. The Board then appointed Mr. David B. Robertson of the Brotherhood of Locomotive Firemen and Enginemen to represent the employees; Mr. Walter White to represent the operators, and Mr. Morris L. Cooke to represent the public.

"The personnel of this panel assures an impartial investigation of the facts to be used by the Board in its determination of the controversy, in accordance with the law.

"The officials of the United Mine Workers of America have ignored the request of the Board that they present their case to the National War Labor Board panel, and likewise have ignored the request of the Board that the strikers be urged to return to their work. I am advised that many thousands of miners are out on strike and strikes are threatened at many other mines which now are in operation.

"The procedure that has been followed in this case by the Board is, I am assured, in exact accord with that followed in all other controversies of this character.

"In view of the statements made in telegrams to me from some members of the United Mine Workers that OPA price regulations have been disregarded and that the cost of living has gone up disproportionately in mining areas, I have directed OPA to make an immediate investigation of the facts and wherever a violation of the law is disclosed by that investigation, to see that the violators of the law are prosecuted.

"The strikes and stoppages in the coal industry that have occurred and are threatened are in clear violation of the 'no strike' pledge.

"These are not mere strikes against employers of this industry to enforce collective bargaining demands. They are strikes against the United States Government itself.

"These strikes are a direct interference with the prosecution of the war. They challenge the governmental machinery that has been set up for the orderly and peaceful settlement of all labor disputes. They challenge the power of the Government to carry on the war.

"The continuance and spread of these strikes would have the same effect on the course of the war as a crippling defeat in the field.

"The production of coal must continue. Without coal our war industries cannot produce tanks, guns and ammunition for
14 our armed forces. Without these weapons our sailors on the high seas and our armies in the field will be helpless against our enemies.

"I am sure that the men who work in the coal mines whose sons and brothers are in the armed forces, do not want to retard the war effort to which they have contributed so loyally and in which they with all other Americans have so much at stake.

"Not as President—not as Commander-in-Chief—but as the friend of the men who work in the coal mines, I appeal to them to resume work immediately and submit their case to the National War Labor Board for final determination.

"I have confidence in the patriotism of the miners. I am sure that when they realize the effect that stopping work at this time will have upon our boys at the front, they will return to their jobs.

"The enemy will not wait while strikes and stoppages run their course. Therefore, if work at the mines is not resumed by ten o'clock Saturday morning, I shall use all the power vested in me as President and as Commander-in-Chief of the Army and Navy to protect the national interest and to prevent further interference with the successful prosecution of the war."

In the meantime the strikes had continued to spread and by April 30 the production stoppage in the bituminous coal fields was complete. On that day, the UMWA Policy Committee having considered the President's telegram, Mr. Lewis sent him a reply which stated that the union had refused to submit the miners' case to the War Labor Board because the Board was "circumscribed" and concluded by its "Little Steel" formula; that it could not give the miners an equitable decision and would "deny our every request." Citing the "mounting prices of food stuffs and the essentials of life" he said the miners had shattered all coal-producing records and had a right to have their case determined "upon the equities involved rather than by application of a pre-fixed rule." Mr. Lewis concluded by expressing the view that collective bargaining should be resumed, as follows:

"We want an agreement. We want to work. The bituminous coal operators have willfully blocked the making of an agreement. We respectfully advise that in our judgment the making of an agreement through a renewal of collective bargaining is the logical means of providing justice and equity to all parties."

15 7. Shortly after 10 a. m., May 1, 1943, the President signed the following Executive Order, No. 9340 (8 F. R. 5695) :

"Whereas widespread stoppages have occurred in the coal industry and strikes are threatened which will obstruct the effective prosecution of the war by curtailing vitally needed production in the coal mines directly affecting the countless war industries and transportation systems dependent upon such mines; and

"Whereas the officers of the United Mine Workers of America have refused to submit to the machinery established for the peaceful settlement of labor disputes in violation of the agreement on the part of labor and industry that there shall be no strikes or lockouts for the duration of the war; and

"Whereas it has become necessary for the effective prosecution of the war that the coal mines in which stoppages or strikes have occurred, or are threatened, be taken over by the Government of the United States in order to protect the interests of the nation at war and the rights of workers to continue at work;

"Now, therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, as President of the United States and Commander-in-Chief of the Army and Navy, it is hereby ordered as follows:

"The Secretary of the Interior is authorized and directed to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.

"In carrying out this order, the Secretary of the Interior shall act through or with the aid of such public or private instrumentalities or persons as he may designate. He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order.

"The Secretary of the Interior shall make employment available and provide protection to all employees resuming work at such mines and to all persons seeking employment so far as they may

be needed; and upon the request of the Secretary of the Interior, the Secretary of War shall take such action, if any, as he may deem necessary or desirable to provide protection to all such persons and mines.

"The secretary of the Interior is authorized and directed to maintain customary working conditions in the mines and customary procedure for the adjustment of workers' grievances. He shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

"Possession and operation of any mine or mines hereunder shall be terminated by the Secretary of the Interior as soon as he determines that possession and operation hereunder are no longer required for the furtherance of the war program."

Upon signing this order the President issued the following public statement:

"On Thursday, April 29, I sent a telegram to John L. Lewis, and Thomas Kennedy, President, and Secretary-Treasurer of the United Mine Workers, pointing out that the coal strikes were a direct interference with the prosecution of the war, and challenged the governmental machinery set up for the orderly and peaceful settlement of labor disputes, and the power of the Government to carry on the war.

"I stated that the continuance and spread of the strikes would have the same effect on the course of the war as a crippling defeat in the war. I appealed to the miners to resume work immediately, and to submit their case to the National War Labor Board for final determination.

"I stated that if work were not resumed by ten o'clock Saturday morning, I should use all the power vested in me as President and Commander-in-Chief to protect the national interest and to prevent further interference with the successful prosecution of the war.

"Except in a few mines the production of coal has virtually ceased. The national interest is in grave peril.

"I have today by appropriate Executive Order directed the Secretary of the Interior, who is the Fuel Administrator and in whose Department is the Bureau of Mines and the Bituminous Coal Division, to take possession of and operate the coal mines, for the United States Government.

17 "I now call upon all miners who may have abandoned their work to return immediately to the mines and work for their government. Their country needs their services as much as

those of the members of the armed forces. I am confident that they do not wish to retard the war effort; that they are as patriotic as any other Americans; and that they will promptly answer this call to perform this essential war service.

"I repeat that an investigation of the cost of living is now being made in the mining areas, and that the Government will insist that the prices be held in accordance with the directions of my recent Executive Order, and violations of the law promptly prosecuted.

"Whenever the miners submit their case to the War Labor Board, it will be determined promptly, fairly, and in accordance with the procedure and law applicable to all labor disputes. If any adjustment of wages is made, it will be made retroactive.

"The production of coal must and shall continue."

Thereafter on the same day the Secretary of the Interior issued an order (8 F. R. 5767) taking possession of all the Nation's bituminous coal mines which produced 50 or more tons per day and all "rail" mines regardless of size, including plaintiff's and some 3,000 others. The order follows:

Order for taking possession

"By virtue of the authority vested in me by the President of the United States, I hereby find from the available information that a strike or stoppage has occurred or is threatened in each of the bituminous coal mines operated by the companies specified in Appendix A attached hereto, and therefore take possession of each such mine including any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mine and the distribution and sale of its products; for operation by the United States in furtherance of the prosecution of the war.

"The President of each company (or its chief Executive officer) specified in Appendix A attached hereto, is hereby and until further notice designated Operating Manager for the United States for such mine and is authorized and directed, subject to such supervision as I may prescribe, and in accordance with regulations to be promulgated by me, to operate such mine and to do all things necessary and appropriate for the operation of the mine, and for the distribution and sale of the product thereof.

"All of the officers and employees of the company are serving the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the distribution and sale of the product

thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

"No person shall interfere with the operation of the mine by the United States Government, or the sale or distribution of the product thereof, in accordance with this order.

"The Operating Manager for the United States shall forthwith fly the flag of the United States upon the mining premises, post in a conspicuous place upon the premises on which such mine is located a notice of taking possession of the mine by the Secretary of the Interior, and furnish a copy of such notice to all persons in possession of funds and properties due and owing to the company.

"Possession and operation of any mine may be terminated by the Secretary of the Interior at such time as he should find that such possession and operation are no longer required for the successful prosecution of the war."

8. Also on May 1, 1943, the Secretary of the Interior promulgated Order No. 1807 and Order No. 1808. Order No. 1807 provided for the delegation of the Secretary's power and authority under Executive Order No. 9340 to himself as Administrator, and to the Deputy Administrator, of the Solid Fuels Administration for War created by Executive Order No. 9332 of April 19, 1943. Order No. 1808 provided for appointment of the 11 regional managers of the Bituminous Coal Division, Department of the Interior, as regional bituminous coal managers (hereinafter referred to as "regional managers") of the Solid Fuels Administration for War, setting forth therein their duties and authority, and for other matters as follows:

"By virtue of the authority conferred upon me by Executive Order of the President of the United States, I hereby order and direct:

19 "1. The eleven managers of the field offices of the Bituminous Coal Division of the Department of the Interior are hereby appointed Regional Bituminous Coal Managers of the Solid Fuels Administration for War, to serve without added compensation. The Regional Bituminous Coal Managers shall use the personnel, records, and facilities of the Bituminous Coal Division in the discharge of their duties under this Order. Each Regional Bituminous Coal Manager shall have jurisdiction co-extensive with the territory covered by the field office of the Bituminous Coal Division.

"2. The Regional Bituminous Coal Managers are hereby delegated full powers of supervision and direction of the operation of all coal mines in their territorial jurisdiction during the period in which possession has been taken and continues under the au-

thority of the Executive Order. They shall have authority to advise and to issue directions with respect to the construction of the Executive Order and such administrative orders as may be issued thereunder by me, and, wherever necessary, to issue (except as provided in section 7) specific directions as to the production, sale, and distribution of coal by the mines subject to their supervision, and as to all operating and financial arrangements of such mines. All directions and orders shall be in writing and a copy shall forthwith be mailed to the Solid Fuels Administrator for War. The Regional Bituminous Coal Managers shall be subject to such supervision and direction of the Administrator as may from time to time be prescribed and shall, whenever in their discretion the delay may be practicable, refer questions of general application or major importance to the Administrator for decision. The Administrator will undertake periodically to make and to distribute to each Regional Bituminous Coal Manager a digest of his decisions and rulings and it shall be the duty of the Regional Bituminous Coal Manager and his staff to familiarize himself with and to follow these decisions and rulings.

"3. Each Regional Bituminous Coal Manager shall maintain a current list of the mines subject to his supervision and of the Operating Manager for the United States in charge of each; shall be the officer in immediate charge of each Operating Manager; and shall submit recommendations to the Administrator as to the administration of the general program, correlation between the several regional offices, and as to the reports which may be necessary from the several Operating Managers.

"4. There is hereby created a Regional Advisory Council in each regional office of the Solid Fuels Administration for War, which shall consist of the chairman and the labor representative of each Bituminous Coal District Board in the territory covered by each of the several field offices of the Bituminous Coal Division. The members of the Regional Advisory Councils shall serve without compensation and will be expected to be on duty in the offices of the Regional Bituminous Coal Managers at such times and for such periods as may prove necessary; where there are two or more chairmen of District Boards or two or more labor representatives on any Regional Advisory Council either or both groups may designate one man to serve in the absence of the others of such group.

"5. The members of each Regional Advisory Council shall be freely consulted by the Regional Bituminous Coal Managers, shall be free to offer advice to him and any member may be assigned such executive duties as the Regional Bituminous Coal Manager may prescribe or delegate. Any member of the Regional Ad-

visory Council shall be free to make specific or general suggestion or complaint to the Administrator who will give it his prompt and careful consideration.

"6. The Operating Managers for the United States appointed by me to operate the several mines possession of which has been taken by me, as well as all other officers, mine workers, and employees, shall serve on behalf of the United States, shall act in recognition of the resulting responsibilities and obligations, and shall be subject to the supervision and directions of the Regional Bituminous Coal Managers but shall not be officers or employees of the United States.

"7. The Secretary of War has stationed one or more liaison officer with each Regional Bituminous Coal Manager, and a liaison officer with the Administrator. Any request for the use of the armed forces of the United States to protect life or property shall be submitted by the Operating Manager in charge of the mine to the Regional Bituminous Coal Manager who shall promptly transmit it with his recommendation and that of the liaison officer to the Administrator for decision as to whether a request for such protection shall be submitted to the Secretary of War pursuant to the provisions of the Executive Order. No Operating Manager and no Regional Bituminous Coal Manager shall have authority to make a request for military protection directly to any officer of the War Department or of the United States Army.

"8. The compliance officers and other employees of the Bituminous Coal Division may be assigned by the Regional Bituminous Coal Managers to inspect the mines subject to their respective jurisdictions and to report upon the operations of the mines, the sale and distribution of bituminous coal and the manner in which the Operating Managers and other officers, mine workers, and employees of the company are discharging the responsibilities and obligations attaching to their service on behalf of the United States."

However, no control over plaintiff's operations was in fact exercised, except in the particular mentioned in finding 12.

9. On Sunday morning, May 2, 1943, the Secretary of the Interior conferred with the UMWA president and asked that the miners be recalled to work pending a survey of the situation brought about by Government seizure. Mr. Lewis stated he would delay a decision until his meeting with the union's policy committee in New York later that day. At about 9:30 p. m., he announced from New York a 2-week truce in the dispute, beginning Tuesday, May 4, and requested the miners to "cooperate with your government." At 10 p. m. that same night the President of the

United States delivered a radio address in which he reviewed the "serious crisis" facing the Nation. Appealing to the miners to discontinue "the strike against the Government," he said the War Labor Board remained ready to give them a fair and impartial hearing with wage adjustments, if any, retroactive to April 1. The miners began returning to work on Tuesday, May 4, but several days elapsed before operations became normal. With the strike thus abated, plaintiff's men likewise returned to work during this first week of May. Designating one of its own officials to represent the miners' interests, the War Labor Board's 3-man panel then resumed its hearings in the dispute, and Mr. Lewis, after another appeal by Secretary Ickes, announced on May 17 an extension of the truce until May 31, 1943.

On May 25 the War Labor Board rendered its preliminary decision in the bituminous coal dispute (8 War Lab. Rep. 502). It denied the demands for a wage increase, double pay for Sunday work, and a guaranteed work-year of 52 weeks, but approved the union's claim for a \$30 increase in the miners' annual vacation payment (from \$20 to \$50), and also its demand that the operators bear the cost of occupational charges, such as those for lamps furnished the miners, effective April 1, 1943. The Board further stated that the parties should resume negotiations with a view to reaching an agreement on the demands for a guaranteed 6-day work week and portal to portal pay. Resuming negotiations the following day, UMWA offered to withdraw the portal pay claim in favor of a \$2 daily rise in wages, later reducing this to \$1.50. But the talks again became deadlocked. On May 31, expiration date of the extended truce, the Interior Department instructed the mines to make work available on June 1 regardless of the status of negotiations; however, on that date another general strike started. Thereupon the War Labor Board ordered the cessation of negotiations and for the second time referred the dispute to the President. On June 3, the President issued the following statement:

"Most of the Nation's coal mines are closed because of a general strike which has taken place in defiance of the Government of the United States. I have instructed the Secretary of the Interior, who has possession of the mines for the Government, to proceed to reopen the mines.

"The Secretary of the Interior will continue to operate the mines under the terms and conditions of work which obtained under the old contract which was extended by order of the War Labor Board plus those new terms and conditions which have been approved by the Board and which were announced in the Board's order of May twenty-fifth.

"As President and Commander in Chief, I order and direct the miners who are not now at work in the mines to return to their work on Monday, June 7, 1943. I must remind the miners that they are working for the Government on essential war work and it is their duty no less than that of their sons and brothers in the armed forces to fulfill their war duties.

"Just as soon as the miners return to work, the disposition of the dispute between the miners and the operators will forthwith proceed, under the jurisdiction of the War Labor Board and in accordance with the customary and established procedures governing all cases of this sort."

The UMWA Policy Committee then voted to return the men to work on June 7, and to again extend the truce, this time through June 20. Most of the miners returned on the specified date, though plaintiff's men remained out until June 9.

23 Absenteeism and sporadic strikes continued to prevail in various bituminous coal-mining areas. The contract negotiations, though revived, brought no agreement and it accordingly became necessary under Executive Order 9017, *supra*, for the War Labor Board to finally determine the dispute. On June 18, 1943, after further hearings the Board issued its final order (9 War Lab. Rep.112). It denied the portal pay claim as beyond its jurisdiction, the demand for a guaranteed work week of 6 days, and, in substance, extended the 1941-43 contracts, as modified by its decision of May 25, above-mentioned, until March 31, 1945, unless changed by mutual agreement of the parties. Expressing his disapproval of this development, the UMWA president advised Secretary Ickes that the miners would work for the Government under the decision, but not the operators. Nevertheless on June 21 a third general strike occurred in the Nation's bituminous coal mines. Immediately Mr. Ickes went into conference with union officials, who, on the following day, ordered the men to resume work, under the Government, until midnight October 31, 1943, with the understanding that the arrangement would "automatically terminate if government control is vacated" before then. Despite this direction, many of the miners remained idle and plaintiff's men stayed out until July 6. By that date practically all of them were back at work, though production remained well below prestrike levels.

Meanwhile on June 23 the President issued another public statement in which he again condemned the strikes as a deterrent to war production and a violation of labor's no-strike pledge. He further stated:

"The mines for the time being of course will continue to be operated by the Secretary of the Interior under the Executive

Order of May first. The terms and conditions of employment will be those announced by the National War Labor Board in its directive of June 18th. There has been no promise or commitment by the Government to change those terms and conditions in any way."

Upon return of the men to work both the President and Secretary Ickes stated that control of the mines would be terminated within 60 days after attaining full productivity.

24 10. In identical telegrams sent on or about May 1, 1943, the Secretary had called upon each mining company's chief executive officer to indicate his willingness to serve as Operating Manager of its mine for the United States, as follows:

"To assure production of coal necessary to win the war, President of the United States as Commander in Chief of Army and Navy has directed me to take over all bituminous coal mines of above-named company. You are being called upon as a loyal and patriotic American to serve as Operating Manager for the United States of the mines of your company and to continue operations at the mines for the United States. Formal instructions and appointment will issue upon your acknowledgment of this call to service by return wire in substantially following form:

"I solemnly undertake to serve the United States and devote myself to the task of producing coal so that the work of winning the war may not falter. I am flying the flag of the United States on the mining premises to show that property is being operated exclusively for the United States and that all employees, including myself, who serve the mine are serving their country. The mine I am operating for the United States is known as the (insert name of your mine or mines and sign, giving your address.)"

"All officials and employees are directed forthwith to perform their usual functions and duties in connection with mine operation, sale and distribution of product. Pending receipt of formal instructions and appointment, you are authorized and directed to continue operations at the mines for the United States. Fly the flag of the United States on the mining premises. Do all things necessary to assure operation of mines Monday. In operation of mines use existing managerial set-up so far as practicable and take all steps within your power to encourage miners to return to work under present wages and working conditions with understanding that any eventual wage adjustment will be retroactive. If any act transpires requiring maintenance of order by use of military forces, communicate with Regional Bituminous Coal Manager who is manager of field office of the Bituminous Coal Division for area in which mine is located for transmission of request to proper officials. The above-named Regional Manager is available for

further instructions if required. In respect to all ordinary production and distribution problems, proceed, so far as practicable, in accordance with previously prevailing policies.

25 Set books up so as to keep separate the period of Government operation. Continue personnel organization as nearly as practicable in accord with normal organization. Advise all supervisory employees of the program. Be governed by all applicable state and federal laws consistent with the order pursuant to which you are acting. In respect to any mines which you are reasonably certain will continue in normal, regular operation, you may submit a recommendation that operation of such mine on behalf of the Government be terminated.

"If you are not acting as chief executive officer of the company, this telegram is to be considered as directed to the officer who is so acting."

The telegram so dispatched to the president of the Pewee Coal Co. was received May 1 at plaintiff's Knoxville office in the absence of its president, Frank Garland, and was therefore relayed to B. F. Mason, then superintendent at its mine. After trying unsuccessfully to locate Mr. Garland, Superintendent Mason later that day sent Mr. Ickes a telegram of acceptance in language identical with that suggested by the above-quoted wire. He also raised the American flag at plaintiff's mine and carried out the other instructions contained in the Secretary's telegram.

Later, on May 12, 1943, having received a communication which called his attention to the fact that no undertaking to serve as Operating Manager for the United States had been submitted by him as plaintiff's chief executive, Mr. Garland promptly telegraphed his own acceptance to Mr. Ickes, using the same language. Simultaneously he sent defendant a letter inviting attention to and confirming the superintendent's previous acceptance and also his own undertaking.

Pursuant to their acceptance, Secretary Ickes on or about May 12, 1943, issued to the chief executive officer of each mining company, including plaintiff's president, a certificate of appointment as Operating Manager for the United States. The certificate of appointment thus sent to Mr. Frank Garland, plaintiff's president, reads as follows:

26 "Whereas, The Secretary of the Interior has, pursuant to the provisions contained in the Executive Order dated May 1, 1943, taken possession of the coal mines listed in the appendix attached hereto, I hereby designate and appoint you as Operating Manager for the United States for such mines. The Operating Manager shall have the following duties and authority, and shall perform the following functions:

"(1) The Operating Manager shall, subject to such supervision as may be prescribed, and in accordance with such regulations as may be promulgated, operate the mines listed in the attached appendix and do all things necessary and appropriate for the continued operation of such mines, and for the production, distribution and sale of the product thereof.

"(2) The Operating Manager and all other officers and employees of the company shall serve the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the production, distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

"(3) The Operating Manager shall, in the operation of said mines, use the customary personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive, but he shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, he shall communicate with the appropriate Regional Bituminous or Anthracite Coal Manager of the Solid Fuels Administration for War for transmission of said request to the proper officials.

"(4) The Operating Manager shall maintain customary working conditions in the mines and customary machinery for the adjustment of workers' grievances and shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

"(5) The Operating Manager, in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines, and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

27 "(6) The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enterprise, utilizing for this purpose any or all funds or properties due or owing or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

"(7) The Operating Manager shall inform banks, creditors, debtors, and other persons having funds or properties due and owing or belonging to the company previously operating the mine that the rights to the funds or properties are now in the possession of the Government of the United States and that the operation of the company's mines will until further notice be conducted for the Government.

"(8) The Operating Manager shall be subject to such accounting as the Solid Fuels Administrator for War may, from time to time, prescribe; and shall be governed by all orders, rules, and regulations issued by the Solid Fuels Administrator for War.

"(9) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise.

"(10) The Operating Manager shall, in such operation, distribution, and sale, comply with all applicable Federal and State laws and regulations.

"(11) The Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States (name of Company)," but the action in either case is for all purposes affecting the possession and control of the United States or the orders and regulations issued or to be issued relating thereto, to be considered as done by the Operating Manager.

"(12) This appointment shall terminate at the discretion of the Solid Fuels Administrator for War upon notice to the Operating Manager.

"(13) The Operating Manager shall, with respect to mines which he reasonably expects to continue in normal, regular operation, submit a recommendation that operation of such mines for the Government be terminated.

"(14) This appointment shall be effective immediately."

11. On May 19, 1943, the Secretary of the Interior promulgated "Regulations for the Operation of Coal Mines under Government Control" (8 F. R. 6655), and on July 29 and August 13, 1943, he promulgated amendments thereto, Nos. 1 and 2, respectively (8 F. R. 10712; 11344). Upon issuance these were promptly transmitted to all Operating Managers.

12. On May 5 and 6, 1943, the Solid Fuels Administration furnished placards and posters to mine Operating Managers with instructions that they be put up at various places on mine property and in mining towns, and a supply of booklets was also

furnished with instructions that they be individually distributed to the miners. The placards displayed the American Flag and beneath it the words:

UNITED STATES PROPERTY!

The Secretary of The Interior

Order for Taking Possession

followed by the text of Mr. Ickes' order, quoted in finding 8. Other posters likewise contained the flag, with the following excerpts from the President's May 2 radio address:

The President of the United States on May 2, 1943 said * * *

"I believe now, as I have all my life, in the right of workers to join unions and to protect their unions. I want to make it absolutely clear that this Government is not going to do anything now to weaken those rights in the coal field. * * *

"I believe that the coal miners themselves as Americans will not fail to heed the clear call to duty. Like all other good Americans, they will march shoulder to shoulder with their armed forces to victory."

The booklets bore the title: "A Message to the Nation from President Franklin D. Roosevelt" and included the full text of said radio address plus extracts from Executive Order 9340. Plaintiff posted and/or distributed these documents.

As part of their contention that living costs had risen disproportionately to wages, the miners had alleged that company stores were disregarding OPA maximum price regulations. Accordingly on May 3, the Secretary directed that mine stores comply with such regulations, and shortly thereafter he conducted a survey of company stores and commissaries to determine their costs and selling prices, requesting the mines to furnish certain information therefor. Plaintiff did so, and advised defendant, in addition, that it would "carefully follow" the May 3 directive. About 2 months later Mr. Ickes, in conjunction with his campaign to reduce accidents in the coal fields, also instructed the mines to operate in full compliance with State and Federal safety laws and regulations.

The Wage Agreement (finding 4) included a provision for an annual vacation to be taken by the miners during late June and early July, stipulating that men who qualified by having 12 months' continuous employment should receive \$20 as vacation "compensation." It also included provisions requiring that the miners pay, among other charges, a rental fee for electric cap-lamps they used in the mines. As heretofore noted the War Labor Board's May 25, 1943, decision modified these provisions by author-

izing a vacation payment of \$50 and the refund, retroactively to April 1, 1943, of occupational charges like rentals on mine lamps. On June 7, 1943, concurrently with the miners' return to work after their second general strike, the Solid Fuels Administration instructed Operating Managers to carry the Board's decision into effect, and stated that in all other respects the terms and conditions of employment would be those obtaining under the old contract, as they were throughout the balance of the Government control period. On or about June 30, 1943, plaintiff made the payments, incurring a cost of \$1,890 over what the unmodified contract would have required for vacation compensation and \$351.26 for lamp-rental refunds.

13. On several occasions Secretary Ickes and his assistants were in touch with the mines in the interest of attaining maximum coal production to meet the Nation's war needs, and also to secure coal production data which they required for various purposes, as hereinafter indicated.

On May 3, 1943, the Secretary directed that all mines operate on the 6-day week, stating that the Office of Price Administration had recently granted coal price increases to
20 cover such operation and that he intended recommending rescission thereof as to any mine that failed to comply. This telegram is as follows:

"To assure maximum production of coal so that war program will not be impeded you are hereby directed to maintain operations of mines under your charge on six days a week. Since maximum prices have been recently increased by Office of Price Administration to permit operation of mines on a six-day week work basis, you are to afford miners an opportunity to work six days each week and are to operate mines under your charge on that basis and to pay time and one-half or rate and one-half for sixth day of work as heretofore agreed upon by collective bargaining and previously cleared by War Labor Board. The Government is relying on you and all mine employees to exercise utmost effort in maintaining and increasing production of coal so vital to the winning of the war. If for any justifiable physical or operating reason six-day week basis is not feasible, timely application for exemption from this directive may be made together with full supporting statement of underlying reasons. I intend to recommend to the Office of Price Administration that the increase in maximum prices for six-day week operation be rescinded as to any mine which fails to comply with this directive."

The Wage Agreement as amended February 11, 1943, had authorized the 6-day week in the industry and most of the mines

were already operating on that schedule. To increase its production the Pewee mine had operated a 6-day week beginning in the summer of 1941, using a system whereby its men, then more than adequate in number, were "floated" or worked irregularly over the 6-day period, but individually their time did not exceed the basic 35-hour 5-day week. This enabled plaintiff to reduce week-end absenteeism, work a 6-day week with full crews, and yet pay no overtime. The aforesaid amendment retained the basic 5-day week with the requirement that it begin each Monday and provided that the men were to be paid at the overtime rate if they worked the 6th day, or Saturday. Following its adoption plaintiff had to discontinue the practice of "floating" men and offer them work on a straight 5- or 6-day basis. It elected to incur the extra cost of the 6-day schedule beginning February 22, 1943, so as to avoid the production loss entailed in a shorter week. There is evidence that the plan did not measure up to plaintiff's tonnage hopes due to week-end crew shortages caused by the habitual absenteeism of some of its miners. By then, also, the number of its better workers had been reduced because of the wartime competition for labor. The management on March 6, 1943, was examining the possibility of discontinuing the 6-day week at its mine. Nevertheless plaintiff remained on the 6-day schedule. On two occasions during May 1943 it informed the Solid Fuels Administration, with reference to Secretary Ickes' communication, that it intended to continue on that basis "unless conditions beyond our control, such as car shortage, etc., make this impossible."

The amended Wage Agreement, in addition, had authorized holiday work in the mines, if consented to by the parties locally. Such work was to be paid for at the overtime rate without, however, interfering with payment of that rate for Saturday work in the same week. Defendant's coal agencies asked the mines to maintain operations on 3 holidays during the involved period but plaintiff could not have been affected except by the last of these requests, involving Labor Day, and the proof does not reveal whether or not its men worked on that day. Prior to Government control the Solid Fuels Administration, in connection with its supply and distribution functions under Executive Order 9332 had asked each bituminous producer to file a weekly card report of its production and running time. On May 12, 1943, the mines were sent a form memorandum in regard to sending in promptly the weekly reports called for by memorandum of May 10, 1943, from Mr. Gray, Deputy Solid Fuels Administrator for War. Attention was called to the importance of furnishing this data in keeping the Administration informed as to the availability of bituminous coal

for war needs. The memorandum concluded with the following sentence: "Our Compliance Officers in all Districts are being instructed to make a check to determine if these reports are being forwarded."

32 For the purpose of supplying information regarding work stoppages by the miners, their causes, and their effect on the production of coal, Operating Managers were instructed to report daily, beginning May 17, 1943, the number of men working the previous day, the number normally employed, the production for that day, and the normal daily production giving the reasons for any marked decrease therein, or for any shutdown of the mine. In plaintiff's area the collection of this information was handled by the defendant's local representative who obtained it in telephone contacts with the several mines and then transmitted the results to the Regional Solid Fuels Manager. These telephone calls were made at the expense of the operating companies, but in plaintiff's case they involved a cost of approximately 60 cents per day, because of the proximity of its mine to the points to or from which they were made. The need for such reports having ceased, the instruction relative thereto was rescinded September 3, 1943.

14. On August 16 the Coal Mines Administration communicated with the Operating Managers with reference to the requirement of the War Labor Disputes Act, instructing them to furnish information upon which the Secretary could make a determination as to the release of their mines, namely, coal production figures for each week since April 1, 1943, any explanation necessary to a reliable comparison thereof, and their opinion, supported by the facts, as to whether productive efficiency had been restored to the level prevailing before Government control. As a result of the information obtained, Mr. Ickes terminated control of 58 bituminous mines on August 20 and 23, and ended it for some 370 others on September 4. Thereafter, he promulgated an omnibus order dated October 12, 1943, which terminated Government control of the Pewee mine and all others not previously released "in accordance with the provisions of the War Labor Disputes Act," as follows:

"On the basis of available information and evidence, and after consideration of all the circumstances, and in accordance with the provisions of the War Labor Disputes Act of June 25, 1943

33 (Pub. No. 89, 78th Cong., 1st Sess.), I find that the possession and control by the Government of any and all of the coal mines now in the possession of the Government should be terminated.

"Accordingly, I order and direct that possession and control by the Government of any and all mines now in the possession of the Government, including any and all real and personal property, franchises, rights, facilities, funds, and other

assets used in connection with the operation of such mines and the distribution and sale of their products, be, and they are hereby, terminated and that there be conspicuously displayed at the mining properties of each of such mines copies of a poster to be supplied by the Coal Mines Administration and reading as follows:

"NOTICE

"Government possession and control of the coal mines of this mining company have been terminated by order of the Secretary of the Interior.

"Provided, however, That nothing contained herein shall be deemed to preclude the Administrator from requiring the submission of information relating to operations during the period of Government possession and control as provided in Section 40 of the Regulations for the Operation of Coal Mines under Government control, as amended (8 F. R. 6655, 10712, 11344), for the purpose of ascertaining the existence and amount of any claims against the United States so that administration of the provisions of Executive Order No. 9340 (8 F. R. 5695) may be concluded in an orderly manner; and Provided further, That except as otherwise ordered, the appointments of the Operating Managers for the mines affected by this order shall continue in effect."

By letter of October 13, 1943, the Director of Production, Coal Mines Administration, transmitted to the plaintiff a copy of the foregoing order terminating control and possession of the plaintiff's property to the extent stated therein. This letter also referred to Instrument Nos. 1 and 2 provided under Section 40 of the Regulations for the Operation of Coal Mines under Government Control and advised the plaintiff that "Failure to execute such an instrument may prevent your full discharge as
34 Operating Manager and may require a comprehensive accounting of the Company's books and records for the period of Government possession and control."

Between May 1 and July 6, 1943, when the last work stoppage ended, plaintiff lost production because of strikes, its men being out 25 working days in all—5 of them in May, 16 in June, and 4 in July. Mr. Garland, plaintiff's president, wrote Secretary Ickes on August 6, 1943, in reference to the latter's July 29 mine-release instructions, as follows:

"* * * you request that each operating manager advise you concerning the termination of Government possession and I am writing to say that in my opinion the Government should continue active control of the mines if not all mines, certainly mines such as ours whose finances are in none too good condition if and until a

new wage contract is negotiated since anything like a \$1.25 per day wage increase retroactive to April 1st would completely bankrupt such mining companies."

In response thereto the Administration advised Mr. Garland that the mines were under Government control to assure the production of coal and their release would be governed by the provisions of the War Labor Disputes Act. It again communicated with him on September 18 to ask that immediate attention be given the August 16 instruction that mine managers supply Mr. Ickes with data that would enable him "to take action * * * with respect to relinquishing Government possession" of the mines, with which Mr. Garland had not complied. Plaintiff acknowledged this request September 24, and its president, on October 4, sent forward the tonnage figures, with his opinion that

"* * * the productive efficiency at this mine has not been restored and as indicated in other communications our tonnage continues considerably off on account of inefficiency, absenteeism, unfavorable operating conditions, etc."

The figures sent by plaintiff evidencing the daily average production are as follows:

35 *Daily average production, Pewee Coal Company, Garland, Tennessee, for each week April 1 through Sept. 29*

[Week figured from Thursday through Wednesday since April 1st was Thursday]

Cars		Cars	
Apr. 1-7	9	July 1-7	2
Apr. 8-14	7	July 8-14	4
Apr. 15-21	11	July 15-21	5
Apr. 22-28	6	July 22-28	5
Apr. 29-May 5	5	July 29-Aug. 4	5
May 6-12	7	Aug. 5-11	2
May 13-18	5	Aug. 12-18	3
May 20-26	4	Aug. 19-25	3
May 27-June 2	4	Aug. 26-Sept. 1	2
June 3-9	1	Sept. 2-8	3
June 10-16	5	Sept. 9-15	4
June 17-23	3	Sept. 16-22	5
June 24-30	0	Sept. 23-29	4

Cars estimated at 50-ton capacity.

In accordance with Section 40 of the amended coal mines regulations and the Secretary's mine-release order, the Coal Mines Administration upon termination of Government control undertook to ascertain the existence and amount of any claims against the defendant. Since plaintiff's president had previously indicated that he considered Pewee's operations were being conducted for the Government's account, the Administration on October 25, 1943, advised Mr. Garland that he should furnish evidence of any

"costs incurred and payments made allegedly as a result of Government possession and control" together with specified accounting data covering the company's operation during the period thereof.

Under date of November 30, 1943, plaintiff wrote the defendant's Deputy Coal Mines Administrator, as follows:

"In conformity with your request under date of October 25, we are sending you herewith the data required in connection with our claim for loss sustained during the period of Government operation, May 1, 1943, to September 30, 1943, amounting to \$42,539.23.

"Under item 1 for statement of costs, etc., resulting from specific directions, we are sending you marked 'Exhibit 1-A' a statement of the \$50.00 vacation payments listing check number, amount, etc., this totalling \$3,150.00. Under our contract we were to pay \$20.00, therefore, the actual loss in excess of our agreement was \$30.00 of the \$50.00 paid each employee, total \$1,890.00.

"'Exhibit 1-B'—A list of refund on mine lamp collections, April and May 1943, total \$394.02.

"'Exhibit 1-C'—A list of the fines which should have been assessed and collected due to our miners being on strike, this totals \$2,106.00.

"'Exhibit 1-D'—Invoice from Timmons Audit Company, Knoxville, Tennessee, for \$125.00 covering expense in connection with the certified statements required by you in the above referred to letter. These four items total \$4,515.02 and are submitted as direct losses on account of specific directions.

"Item #2—Our position is as advised your department from time to time during the period of Government control that we were operating this property for the account of the Government and that we are due the total loss of \$42,539.23. This, of course, embraces the other items listed in connection with item #1 above except the \$125.00 accounting expense.

"Item #3 and #4—Herewith the requested balance sheet and statement of profit and loss made by certified public accountants.

"Item #5, 6, 7, and 8—As it will be noted there are no abnormal changes in assets, investments, etc., nor any charge whatsoever for bad debts or reserves therefor. The depreciation, depletion, etc., reflect a constant figure and differ from the previous year only on account of equipment or additions to plant, etc. There are no affiliated companies, hence, nothing to report with reference to accounts due, etc.

"Item #9—The comparative tonnage production summary is attached and should be compared with only 1942 as this mine was put into production in 1941 and did not reach anything like normal production until the late fall of that year.

"In line with your direction, we have executed as President of this company the affidavit requested from an officer of the company, specifying on the face thereof 'see attached,' and the attachments are made a part of the affidavit.

"Since we are in immediate need of funds, we ask that you approve our claim promptly and we shall appreciate advice from you as to about how long it will be necessary for us to await remittance covering."

37 In response to said letter the Deputy Coal Mines Administrator, under date of December 14, 1943, wrote plaintiff as follows:

"Receipt is acknowledged of your letter of November 30, 1943, transmitted by Ansell, Ansell and Marshall, Attorneys at Law, enclosing herewith various data compiled by Timmons Audit Company, Public Accountants and Auditors, of Knoxville, Tennessee, in support of your claim for loss alleged to have been sustained during the period of Government operation of your mine from May 1 to September 30, 1943, however, you have failed to fully supply the information requested in our letter of October 25.

"It is noted that the period the Auditor used for compiling the results from operations was April 30 to September 30, 1943, whereas the period of Government possession and control of your mine extended from May 1 through October 12, 1943, and data should be prepared for that period."

"Your attention is called to the next to the last paragraph of our letter of October 25, wherein we granted permission to prorate the expenditures for the odd periods for the previous two years on an equitable basis so long as the basis used is a reasonable one. However, the basis used should be set forth in detail in the Auditor's report.

"With respect to the last paragraph of your letter. I regret to inform you that this office cannot make any funds available to your company. Any claim it may have against the Government would have to be prosecuted in accordance with the applicable Federal statutes and regulations concerning claims against the United States. The data we have asked you to file is being compiled with a view to furnishing the appropriate agency with full information as to the claim your company is reserving, should it elect to prosecute that claim. The compilation of this data is not intended to indicate that this office in any way approves the claim reserved."

The plaintiff's compliance with the defendant's instruction letter of October 25, 1943, asking that it submit a comparative balance sheet and a comparative profit-and-loss statement certified

by an independent public accountant required it to expend \$125 for the employment of such accountant.

38 15. Besides the production loss due to strikes, as previously noted, the tonnage from plaintiff's mine, the so-called Pewee No. 1, was seriously diminished subsequent to May 1, 1943, by underground physical conditions. A drift mine, driven into a mountainside at an elevation paralleling the coal seam, it was constructed beginning in the summer of 1940, first produced coal in early 1941, and was in continuous production thereafter. The mine's main entry was driven nearly the entire distance through a spur on the southeast side of plaintiff's leasehold, and as projected—but not driven—into the principal body of plaintiff's coal situated beyond the spur. The main entry consisted of 3 separate "headings" or openings, the central of which was the main passageway that provided the means of access to all underground operations from the outside. The other 2 headings were air courses, required for ventilation of the mine. From the main passage, side entries were driven into the spur, at intervals, in order to fully mine that particular area as the development was progressing through it preliminary to reaching the chief coal deposit. These lateral entries were identified by number and their location on the main entry's north or south flank. Most of the coal was actually obtained from large individual openings 250 to 300 feet deep and 50 to 75 feet wide, known as "rooms," and driven, in succession, at right-angles to and off both sides of the lateral entries. Coal-bearing pillars and walls were necessarily left between these rooms and other mined-out places to support the weight of the land-mass or mountain top above the mine, and safe mining practice required that their strength be adequate for that purpose.

In the latter part of 1941, less than a year after Pewee No. 1 went into production, plaintiff commenced using an unconventional or unusual method of working its rooms "on the advance," that is, immediately upon turning a lateral entry it drove and mined the rooms while also advancing the entry, instead of first driving and developing the entry to its full projected length and then working the rooms from that point back, or "on the retreat," toward the main entry, which is the usual method. Plaintiff likewise started taking excessive amounts of coal from certain

of the pillars and room walls, thus weakening the supports
39 and setting in motion a gradual shifting of the mountain top above the mine. This movement, or "squeeze," finally manifested itself in May 1943 over the mine's third north entry. Around the end of that month the entry's roof began collapsing at points adjacent to rooms which had already been mined. Since

3rd North was being worked "on the advance" these rooms were closer to the main entry than others which were then being mined and the condition not only threatened to block plaintiff's access to them but also to considerable more distant coal-bearing territory which had not yet been reached. Measures were accordingly taken during June in an effort to keep 3rd North open but that became increasingly difficult and by early July the entry and its coal had to be abandoned. Plaintiff had pursued these mining practices with the object of producing a greater and quicker volume of tonnage which, if not profitable, would at least lessen its costs while the work was progressing through the spur and into the principal body of its coal, where greater territory would be available for development.

In July 1943 the mine's main entry was driven into the initial stages of a "fault" or low-coal area. From a normal 38 inches the coal began gradually declining in thickness as the entry was advanced. The superintendent in charge of the mine, Arnold McNealy, thought the condition might become serious and, at a conference between the mine supervisory personnel and plaintiff's president, he so advised the latter. At or about this same time Mr. Garland first wrote the defendant with a view to obtaining financial aid in operating plaintiff's mine. His letter to the Solid Fuels Administration, dated July 22, 1943, was as follows:

"From the enclosed reports you will note that our Company operated during May and June under Government ownership at a loss of \$20,815.95. This was occasioned in part by the sporadic strikes, our mine continuing idle until the seventh of the current month and tonnage has been especially low since that date, and also by reason of the substantial vacation payments.

"In order to meet our maturing payments including pay roll it becomes necessary for us to call on you for the loss sustained, and since we do not have sufficient funds in hand to meet our 40 June bills, pay roll due July 31st, Social Security, Victory Tax, Old Age Benefits, and 20% Withholding Tax, we ask that you send us a voucher by air mail.

"P. S. Most of the industrial coal from this operation is being shipped the Tennessee Valley Authority for generating power, a substantial part of which goes to the Aluminum Company, so you will note the urgent necessity of keeping this mine in production."

By follow-up communications dated July 27 and 28, plaintiff's president urged "quick handling" of this matter. On July 31 the Administration's Director of Production wrote Mr. Garland:

"I regret to inform you that this office is unable to afford your company any financial assistance. The mining company, through

its duly authorized officials, and in accordance with applicable company procedures and pertinent laws, should utilize and draw upon any funds, accounts, or properties due or belonging to the company for the purpose of meeting financial obligation. In the event that such funds, properties, or accounts are insufficient, customary sources of credits or funds should be utilized.

"No Operating Manager for the United States of any mining company is authorized or shall be regarded as having authority express or implied, to bind or impose liability on the United States or any of its officials or agents in the absence of specific direction or order by the Administrator to that effect. Nor shall any operations of any mine property in possession and control of the Government, or the proceeds, earnings or liabilities of such mine property in any event be, or be regarded as being, for the account or at the risk or expense of the Government except as specific written direction or order to that effect be given by the Administrator. Accordingly, all losses or deficits incurred during the period of Government possession are, as heretofore, for the account of your company and to be borne by it."

16. In bituminous coal mining a "fault" is an area where the coal has been displaced by geological pressure on the seam, and consequently its normal thickness has been materially lowered. It is not uncommon to experience faults while mining coal. Many of the faults in the Pewee mine were "local," that is, the coal seam becoming thin for only a short distance and then resuming

41 average thickness. However, faults occasionally were extensive. Faults might appear abruptly or gradually. Faults necessarily involve a greater mining cost, measured by the thickness and extent of the coal displaced because of the increased quantities of rock (and not coal), that must be removed. However, most of the faults encountered in the Pewee mine during Government possession were local, were not unusual and were generally compensated for by the fact that the coal, being of high grade, sold for a higher price with good production.

Superintendent Mason, who began his period of employment at the mine in August 1941 and left about May 1943, had mined through at least one local fault and low coal during the month of May 1943. Superintendent McNealy, who came in as superintendent in July 1943, discovered 3 or 4 weeks after he had commenced work in the main entry, an extensive and serious fault. The coal began to get smaller, and unfavorable conditions obtained in the Pewee mine. After a futile effort to mine through this serious fault in the main entry. Mr. McNealy recommended that work in the mine be stopped due to the high cost of operation.

This recommendation was concurred in by Mr. J. M. Patteson, an Industrial Engineer, who was employed by plaintiff for a period from August 1943 to April 1945, and who was also, for a time, superintendent of Pewee No. 1.

Since the mine's existence depended upon advancing the main entry—its life line—this recommendation, if adopted, would have left but one alternative—to retreat from and close out the entire mine operation. This was opposed by T. J. Musick, a foreman, who theretofore, for a time, had been in charge. He maintained that the low-coal area would soon be gotten through, and plaintiff's president agreed with him.

Accordingly, mining operations were continued while Mr. Garland, during the latter part of July 1943, consulted plaintiff's vice president, W. E. Davis of Lexington, Kentucky, whose particular function was to advise with him on technical mining matters. Mr. Davis was president of various coal mining companies in that general section, as well as plaintiff's vice president and a stockholder of plaintiff including the year 1943. Mr. Davis
42 visited the mine during the latter part of July or early part of August 1943. During his visit operations were being conducted in the main head entry above the 5th South; also some work was being performed in the left South and also the 5th South. Some work was also being performed in the 4th North, and some coal was being taken from 3rd South and 5th South. The coal was down to about 18 to 20 inches in the main heading. Observations indicated that the coal through which work had proceeded up to this point, had varied in thickness; some of it had been 34 to 35 inches thick, and that no work was being performed in the 2nd and 3rd North on account of crumbling of the pillars of the mine. This crumbling prevented continued operations in taking coal in that area, this being due to the squeeze resulting from plaintiff's taking coal from pillars, and failing to leave enough to keep the top from falling in. Plaintiff's operators had taken large amounts of tonnage from 3rd and 4th North, which caused the drop of pillars at those points, and had left a lot of coal which could not be mined. (Finding 15.)

After his visit to the mine Mr. Davis and Mr. Garland held a conference regarding the situation. Owing to the physical conditions in the mine, which they deemed unfavorable, and losses being sustained, they agreed that a drastic change in policy would be advisable. They also considered the advisability of going into the Red Ash mine which plaintiff also owned.

Mr. B. R. Stout, mining engineer for the Coal Creek Mining and Manufacturing Company, plaintiff's lessor, inspected plain-

tiff's Pewee No. 1 mine three times during 1943. Mr. Stout ascertained on his visit to the mine July 8, 1943, that plaintiff had just encountered what later proved to be a serious fault, but on that date it was not definitely known to be a fault. The coal lowered in thickness for about 10 feet and then became materially thicker again, which situation is not unusual in a mine. Such a situation was noted on Mr. Stout's visit. On or about August 10, 1943, Mr. Stout returned to the mine and made another inspection, during which he found that the fault had developed into a serious one. This visit was made at the request of Mr.

Garland, plaintiff's president, who advised Stout that they had encountered a fault which looked bad. Thereafter

Mr. Garland and Mr. Stout had frequent conferences regarding the general situation. Mr. Stout advised Mr. Garland and Mr. McNealy to go on through or try to find a way around the fault. Again on September 22, 1943, Mr. Stout visited the mine and was told that they could not find a way around the fault. Again on September 22, 1943, Mr. Stout visited the mine and was told that they could not find a way around the fault, though the mine was on that date still operating, mining coal and also endeavoring to find a way through or around the fault. The work in the mine was subsequently discontinued with permission of the lessor, on or about January 1944, and retreat operations were carried on after that date.

Mr. Stout, as manager of Coal Creek Mining and Manufacturing Company, lessor, under date of August 27, 1942, had written Mr. Garland a letter regarding conditions in this mine, reading, in part, as follows:

"Room No. 1 drive off L South Main (driven toward crop) should never have been driven. In fact a solid block to room No. 2 is little enough coal to have left as a safety block to protect your Main. The safety block, on the right side of the Main, is only the thickness of a room. The work has been 'projected' between Nos. 1 and 2 North, but a room has been worked inside the pillar projected to be left. I am sorry to say it, but the map actually looks like a map of a little truck mine. You have more territory and will probably be working longer than Clinchmore, but in no place have they touched a ton of coal within 200 feet of either their Main or Airway. 'Hoggin' coal, especially near a Main that has to live for 30 or 40 years, is very, very poor practice, and can be extremely expensive.

"I realize there is a great temptation on the part of every one connected with a mine to show a big profit this month, and this year, but a mine is a long-time proposition, and it is often far better

to make very little profit or barely break even for the first few years, and get your mine development ahead, and your entries properly protected. Clinchmore has had the most satisfactory system, and I am sure has showed up a larger profit to them over the years, and that is to drive their working entries up, then start room work from the back and 'leave all their troubles behind them,' robbing the entry as they finish with the rooms. The coal cost is slightly higher while you so develop an entry, but you get your investment back with compound interest, and above the legal rate too, when you work the entry."

44 17. Included in plaintiff's leasehold, and situated at approximately 100 feet lower level than the Pewee coal seam, was another seam known as Red Ash. Red Ash coal was inferior to Pewee in quality and hence brought a lesser price on the market. A separate agreement between plaintiff and the Coal Creek Mining and Manufacturing Company, signed in connection with the latter's participation in the financing of the railroad extension serving plaintiff's property, required that it either develop Red Ash within 6 years after the agreement or pay a royalty to retain the mining rights thereto. In view of the decreased yield of the Pewee mine, it was decided to open the Red Ash mine at once. This was done in August 1943.

On August 3, 1943, while plans for the above projects were being formulated, Mr. Garland again wrote the defendant in a further effort to obtain its financial aid for plaintiff's operations, as follows:

"It may be that the Government has confiscatory powers which would warrant them in seizing a citizen's property, appointing a manager of their own selection, issuing orders to him as to how he should conduct the operation of the property and then forcing the property owner to absorb any loss attendant upon this handling. However, I cannot believe that here in the United States our Government will go to this extreme. Consequently, I am taking the liberty of sending copy of our correspondence to Senator Stewart and Congressman Jennings of this State.

"The above has to do with your letter of July 31, and I want to refer to the second paragraph thereof and ask your advice as to what procedure is to be followed after all the 'customary sources of credits or funds' have been exhausted. In this particular case I personally arranged for the money to meet the pay roll for the July first half period, and this company being a relatively new mine is heavily in debt for equipment purchased and cannot secure additional funds. It is my understanding that you have advanced other operations money for meeting pay rolls and I would

like definite advice from you concerning this and if so the reason for refusing our request.

45 "From the last paragraph of your letter I take it that the Administrator may issue specific instructions to impose certain liabilities on the United States and if this is the case, I ask that you review this matter and place our request before the Administrator asking that he issue an order covering our situation.

Two days later, on August 5, plaintiff's president presided over a meeting of its Board of Directors at which resolutions were adopted (1) authorizing the corporate officers to "effect loans, advances, or other forms of credit at any time or times" from the company's principal bank, and (2) recommending a \$50,000 increase in the corporation's authorized capital stock. On August 19 the stockholders unanimously approved these resolutions, and shortly thereafter approximately \$30,000 of the additional stock was purchased. These funds were used for current operating expense of the Pewee No. 1 mine, to reduce bank loans covering equipment purchases, and to defray the cost of the first of the Red Ash mines, construction of which began later that month.

Not having previously consulted the East Tennessee Iron & Coal Co., one of the lessors, about the fault, he directed the following letter, dated September 7, 1943, to it:

"As you know, our main heading has gotten into some very low coal with sandstone top which is very difficult to drill and shoot and as a consequence thereof our tonnage has dropped to a very small figure.

"For the last several weeks we have been driving ahead both on our main and in four north where likewise we are in low coal with this sandstone roll for top, hoping that conditions would improve but we have decided to open the red ash seam and are building a tram road around to the right facing the incline and will hoist the red ash coal to the Pewee level. The particular problem we want to discuss with you is whether we shall continue driving the main heading of Pewee until we are through the fault or discontinue operations in that seam as our red ash tonnage increases or extend the tram road 4,000 to 5,000 feet around the mountain to a point at the head of the left fork of Mangrove Branch where our outcrop shows forty inches of clean Pewee coal with no evidence of sandstone roof and extract the Pewee from that mine opening.

46 "Information reaches us that you are doing some core drilling in an area contiguous to our lease and at your entire convenience we would like to talk with you about core drilling ahead of our main entry in an endeavor to establish the confines of the sandstone roll as it would be much more profitable to

you as well as ourselves to continue our main heading if a few hundred feet put us through this fault rather than spending a substantial amount of money on an outside tram road."

The meeting therein proposed was not held until January 11, 1944 (Finding 19).

Under date of September 15, 1943, plaintiff's president applied to the Smaller War Plants Corporation of the United States Government for a loan of \$25,000, and tendered as collateral therefor certain of the company's buildings and all of its coal cutting and loading machines, which he valued at \$65,276.80. Two days later, in answer to a communication from it, Mr. Garland wrote the Coal Mines Administration:

"* * * this will reiterate my advice that we are operating this mine for the account of the United States Government and if you will advise the form in which we are to submit the statement of the amount they are due us and other data required so that we may settle this account, we shall be pleased to fill it out promptly and arrange to take this mine back over for private operation as soon as our account has been settled."

18. On September 24, 1943, the Deputy Coal Mines Administrator, Carl E. Newton, responded to plaintiff's August 3 letter, set forth hereinbefore, as follows:

* * *
"To date the Coal Mines Administration has not advanced funds to any coal mining company. In my address to the American Mining Congress at Cincinnati, Ohio, delivered on July 20, 1943, and broadcast over the Mutual Broadcasting System, I specifically stated that the Coal Mines Administration has not and does not intend to advance money to coal mining companies. I am enclosing a copy of this address for your information.

"I assume that you have now received a copy of Amendments Nos. 1 and 2 to the Regulations for the Operation of Coal Mines under Government Control which provide a procedure for mining companies to assert claims for liability against the Government, directly resulting from any specific direction or order. With respect to your inquiry concerning the procedure to be followed to obtain funds after all customary sources of credits or funds have been exhausted, you are advised that, as stated in Mr. 47 Thomas' letter to you of July 31, 1943, operation of your company's mining property is for the sole account of your company and not for the account of the Government. Accordingly, the matter of obtaining funds with which to operate is one to be handled by your company through its duly authorized officials and in accordance with applicable company policies and pertinent laws.

"With regard to your request that the Administrator issue an order covering your situation, I regret to inform you that, on the basis of all the facts and circumstances presented, such request must be denied."

Plaintiff's president thereupon made the following further appeal for the defendant's financial assistance by letter to the Deputy Administrator dated September 28:

"You may be assured that I appreciate your comprehensive letter under date of September 24th and the more comprehensive information contained in the excellent address delivered by you in Cincinnati on July 20, and I regret I could not get away to attend the American Mining Congress this year.

"Being handicapped by not having had legal training, we find it difficult at times to follow directives, orders, etc., of the Government which I know must conform to all existing statutes, regulations governing procedure, etc. In view of this I would like to submit our position with reference to our operation of the Pewee Coal Company Mine when it was taken over by the Government. At that time we were seriously debating discontinuing operation due to the labor situation, unfavorable operating conditions, etc., but felt that we had no choice in the matter when the Government took over and directed that we carry on. We assumed, as indicated previously, that we were operating for the account of the Government. Certainly, we would have discontinued producing Pewee coal and refused to pay the so-called increased vacation payments, etc., which amounted to several thousand dollars if we had been operating 'on our own.' In view of your position we are instructing our operating department to discontinue all advance work at this mine recovering what little tonnage they can and it will be out of production in the next several weeks.

"Our total loss under Government operation amounts to between \$30,000 and \$35,000. It is sincerely hoped that it will not be necessary for us to engage an attorney to handle our claim and feel that this will not be necessary if you will advise us with reference to our position as stated hereinbefore and send us the proper papers for filing our claim."

48 In reply thereto the Deputy Administrator, on October 7, wrote Mr. Garland, in part:

"Section 17 of the Regulations for the Operation of Coal Mines under Government Control provides, in part as follows:

"No operating Manager for the United States of any mining company is authorized or shall be regarded as having authority, express or implied, to bind or impose any liability on the United States or any of its officials or agents in the absence of a specific

direction or order by the Administrator to that effect. Nor shall any operations of any mine property in the possession and control of the Government, or the proceeds, earnings or liabilities of such mine property in any event be, or be regarded as being, for the account or at the risk or expense of the Government except as a specific written direction or order to that effect shall have been given by the Administrator.

"These regulations plainly contemplate that, in the absence of a contrary direction by the Administrator, where the management has deemed it advisable for sound operating reasons to abandon operations at any particular mine, it may do so. Indeed, a number of mines have been shut down during the period of Government possession, where, in the exercise of their prudent business judgment, the mine owners decided that cessation of operations was necessary."

19. Plaintiff carried on in the 4th North and 5th South entries with work of the character previously described, and in November it also resumed driving the main entry. Since the coal's thickness showed no improvement, Superintendent Patteson again stopped the "main" about November 20. On January 11, 1944, Mr. Garland met with representatives of both lessors and informed them that the mine had been "temporarily" abandoned because of the fault. In a discussion as to plaintiff's future plans, East Tennessee suggested that a few diamond-core drillings be made, or that a narrow test entry be driven through the fault, with which Mr. Garland was inclined to agree, but Coal Creek was not, it having become convinced by then that plaintiff had made due effort to overcome the fault and that further attempts would prove equally unsuccessful. It accordingly granted its permission to withdraw.

49 Plaintiff thereupon commenced retreat operations, withdrawing from Pewee No. 1 and removing from the pillars and other places the coal that could not be mined as long as there was any expectation of the operation advancing. This "robbing" is the usual practice when retreating from a mine. It was completed in the late Spring of 1944, and Pewee No. 1 was then abandoned. It has since caved in. The first Red Ash mine, which had gone into production about the middle of November 1943, was likewise unsuccessful. It was abandoned in early 1944. Plaintiff then undertook the project of extending the outside tram road 3,500 feet around the mountain, as hereinbefore mentioned, and developed a new Pewee mine at that point, which is the present operation.

20. During the period April 1, 1942, to March 31, 1944, the

plaintiff produced coal through its mining operations at Garland in the following volume, and with the following total realization, total cost, and net profit or loss:

Period	Total tons produced	Total realization	Total cost	Total net profit or loss ¹	Per ton profit or loss ¹
1942					
April	13,072.70	\$39,442.58	\$36,135.46	\$3,307.12	\$0.26
May	12,045.15	36,768.76	36,985.60	276.84(L)	.02(L)
June	11,354.95	34,235.74	36,991.60	2,755.86(L)	.24(L)
July	10,767.10	32,533.76	28,986.25	3,547.51	.33
August	9,455.55	28,909.59	30,724.04	1,724.45(L)	.18(L)
September	9,928.45	30,320.53	31,154.67	834.14(L)	.08(L)
October	13,397.35	41,640.51	35,808.84	5,771.67	.43
November	10,982.10	34,667.73	32,316.81	2,350.92	.22
December	11,401.20	35,983.38	35,434.98	548.40	.05
1943					
January	11,339.65	35,517.06	38,682.40	3,164.44(L)	.22(L)
February	9,879.45	32,806.06	33,976.86	1,170.80(L)	.12(L)
March	10,177.05	34,611.09	44,142.83	9,538.74(L)	.94(L)
Total, fiscal year	133,800.70	417,476.69	421,407.34	3,939.65(L)	.03(L)
1943					
April	11,217.85	38,320.65	37,090.03	1,230.62	.11
May	7,158.50	24,800.54	31,444.35	6,943.81(L)	1.04(L)
June	2,771.00	9,473.54	16,251.83	6,778.29(L)	2.44(L)
July	5,852.85	19,876.69	26,659.28	6,782.59(L)	1.15(L)
August	3,721.70	12,965.05	24,211.28	11,246.23(L)	3.03(L)
September	5,421.45	18,924.71	21,478.75	2,554.04(L)	.46(L)
October	5,255.40	18,338.36	21,420.33	3,081.97(L)	.57(L)
November	4,409.70	15,026.83	21,873.19	6,846.36(L)	1.55(L)
December	4,243.50	15,850.56	22,058.94	6,208.38(L)	1.46(L)
1944					
January	5,132.80	19,369.84	25,060.36	5,690.52(L)	1.13(L)
February	6,327.65	24,514.73	22,668.80	1,845.93	.30
March	7,680.10	30,963.35	11,947.18	19,016.17	2.49
Total, fiscal year	69,192.50	248,434.85	282,464.82	34,039.47(L)	.49(L)

¹ Figures accompanied by (L) indicate loss; others indicate profit.

² Figures affected by recapture of car rentals paid out during the fiscal year in the amount of \$6,756.50.

50 The parties agree that the plaintiff's net loss, during the period of Government possession of its mine, was \$36,128.96, not taking into consideration amounts that might have been realized by plaintiff by the assessment of strike fines. These fines, however, were not assessed and no income was realized therefrom. Plaintiff's loss for the period of Government possession was \$36,128.96.

21. The proof does not establish that plaintiff's loss is attributable to any act of the defendant, except to the extent of \$2,241.26, as set out in finding 12. By reason of Government possession and control plaintiff hoisted the American Flag, put up posters and placards, distributed booklets to its miners, and cooperated in supplying certain coal production, work stoppage and mine commissary information, as hereinbefore mentioned. Its management and personnel performed their customary functions and duties in the regular and normal course of its business;

no changes were required or made in its internal operating methods; and its books and records of account were maintained in the same manner. Plaintiff's mining operations subsequent to May 1, 1943, are not shown to have been in any respect different because of Government control.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover, and it is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of two thousand two hundred forty-one dollars and twenty-six cents (\$2,241.26).

Opinion

WHITAKER, Judge, delivered the opinion of the court:

Plaintiff, the operator of a coal mine, sues to recover its operating loss during the time the Government was in possession of its mine from May 1, 1943, to October 12, 1943.

When the Government took possession it appointed plaintiff's president as the Operating Manager of the business and instructed him to continue to operate the mine and to sell coal as theretofore, unless otherwise directed. Plaintiff continued operations without any interference on the part of the Government, except in one respect, to be mentioned later. Plaintiff determined the method of operation, determined whether to continue operations in this place or that, or to discontinue them altogether. Plaintiff sold its coal to whom it pleased and at whatever price it could get for it. It collected for coal sold and put the money in its own treasury.

It did all this without let or hindrance from the Government. It operated its business precisely as it had before the Government took possession of it, except in the one instance referred to above. However, it was at all times subject to Government control and direction.

Plaintiff says that at the Government's direction it continued operations beyond the time it believed it advisable to do so, but the proof does not support this contention. As the findings show, plaintiff made its own determination as to whether to continue or discontinue operations, and this without any direction from the defendant or even without any consultation with it.

The Government seized coal mines throughout the country, including plaintiff's, in an effort to end a strike of the United Mine Workers that threatened to seriously cripple our prosecu-

tion of the war. Notwithstanding the disastrous consequences of their action, the United Mine Workers could not be induced to work for the mine owners unless their demands were met, and the owners would not meet their demands. In this extremity the Government decided it would seize the mines in the belief that while the miners would not work for the owners, they would work for the Government. Accordingly, the President issued an order on May 1, 1943, directing the Secretary of the Interior to take immediate possession of all mines in which there was a strike, insofar as this was necessary in the judgment of the Secretary. He was directed to take possession of "all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines, and to
 52 operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war. * * *

In carrying out the order he was directed to act through "such public or private instrumentalities or persons as he may designate." It was further ordered:

"He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order."

On the same day, the Secretary of the Interior issued an order taking possession of most of the mines, including plaintiff's. This order read in part:

"I * * * therefore take possession of each such mine including any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mine * * *."

"The president of each company (or its chief executive officer) specified in Appendix A attached hereto, is hereby and until further notice designated Operating Manager for the United States for such mine and is authorized and directed, subject to such supervision as I may prescribe, and in accordance with regulations to be promulgated by me, to operate such mine and to do all things necessary and appropriate for the operation of the mine, and for the distribution and sale of the product thereof."

"All the officers and employees of the company are serving the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States."

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"The Operating Manager for the United States shall forthwith fly the flag of the United States upon the mining premises, post in a conspicuous place upon the premises on which such mine is located a notice of taking possession of the mine by the Secretary of the Interior, and furnish a copy of such notice to all persons in possession of funds and properties due and owing to the company."

By a subsequent order the Secretary of the Interior appointed 11 Regional Managers, who were given "full powers of supervision and direction of the operation of all coal mines in their territorial jurisdiction during the period in which possession has been taken and continues under the authority of the Executive Order." Where necessary, they were authorized "to issue * * * specific directions as to the production, sale and distribution of coal by the mines subject to their supervision, and as to all operating and financial arrangements of such mines." Paragraph 6 of this order read:

"The Operating Managers for the United States appointed by me to operate the several mines, possession of which has been taken by me, as well as all other officers, mine workers and employees, shall serve on behalf of the United States, shall act in recognition of the resulting responsibilities and obligations, and shall be subject to the supervision and directions of the Regional Bituminous Coal Managers but shall not be officers or employees of the United States."

Plaintiff's president accepted appointment as Operating Manager, and, in accordance with the Secretary's direction, he took the following oath:

"I solemnly undertake to serve the United States and devote myself to the task of producing coal so that the work of winning the war may not falter. I am flying the flag of the United States on the mining premises to show that property is being operated exclusively for the United States and that all employees including myself, who serve the mine are serving their country. The mine I am operating for the United States is known as the Peewee Coal Company."

The Operating Manager was directed to proceed so far as practicable in accordance with previously prevailing policies, but he was directed to "set books up so as to keep separate the period of Government operation."

Upon receipt of the oath the Secretary issued to plaintiff's president a certificate of appointment as Operating Manager for the United States.

Paragraph 5, 6 and 7 of this certificate read as follows:

“(5) The Operating Manager, in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines, and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

“(6) The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enterprise, utilizing for this purpose any or all funds or properties due or owing or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

“(7) The Operating Manager shall inform banks, creditors, debtors, and other persons having funds or properties due and owing or belonging to the company previously operating the mine that the rights to the funds or properties are now in the possession of the Government of the United States and that the operation of the company's mines will until further notice be conducted for the Government.”

But, while the defendant thus asserted the complete right to direct and control, it, in fact, never exercised this right, except in the one instance mentioned later.

Plaintiff seeks to recover under the Fifth Amendment providing for just compensation when private property is taken by the Government. The defendant says it did not take plaintiff's property, but this position cannot be maintained unless we say that the President's Executive Order and the order of the Secretary of the Interior taking possession of the mine, the oath which the Operating Manager was required to take, and the certificate of appointment issued to the Operating Manager, were all pretense and sham.

All of these things were done in order to induce the miners to return to work. It was done in the belief that they would be willing to work for the Government, although they were unwilling to work for the private owners. We are loath to say that the Government practiced a fraud upon them. Every effort was made to make it appear that the mines were being operated by the Government, and we cannot bring ourselves to say that all this was a premeditated fraud. An old Persian proverb says that “the priceless ingredient of every product is the honor and integrity of its maker.” If the Government was dishonest, if its protestations were lacking in integrity, what is there left in

which we can place our trust? The Secretary undoubtedly undertook to take possession of the mines and undertook to make it appear that he had done so, and his authority to do this has not been questioned. We cannot but hold that the Government did in fact, as well as in name, take possession of plaintiff's mine, and that it is liable for whatever consequences flow therefrom.

In the case of *United States v. Mine Workers*, 380 U. S. 258, it was contended that miners working in mines that had been seized by the Government were Federal employees and that, therefore, the prohibition against injunctions in labor disputes contained in the Norris-LaGuardia Act did not apply. The court said (p. 284) that Congress, in passing the War Labor Disputes Act, "intended that by virtue of Government seizure, a mine should become, for the purposes of production and operation, a Government facility in as complete a sense as if the Government held full title and ownership." The court pointed to the agreement entered into between the United Mine Workers and the Secretary of the Interior providing for wages and operating conditions, and then said (p. 288):

"The defendants, however, point to the fact that the private managers of the mines have been retained by the Government in the role of operating managers with substantially the same functions and authority. It is true that the regulations for the operation of the mines issued by the Coal Mines Administrator provide for the retention of the private managers to assist in the realization of the objects of Government seizure and operation. The regulations, however, also provide for the removal of such operating managers at the discretion of the Coal Mines Administrator. Thus the Government, though utilizing the services of the private managers, has nevertheless retained ultimate control." The court concluded:

"We hold that in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply."

56 The material facts in that case and this case are the same.

The only difference is that in that case the seizure was under the War Labor Disputes Act, whereas this seizure was prior to the passage of that Act. This, however, seems to us immaterial, since in this case the authority of the Secretary of the Interior to seize the mines is not put in question.

There is in question, however, the liability of the Government for this seizure.

Ordinarily, the measure of liability where the Government takes temporary possession of property is its rental value. *United States v. General Motors Corporation*, 323 U. S. 373. Plaintiff in this case, however, sues not for the rental value of its mine but for the losses sustained in operating it while the Government was in possession. In our opinion, there can be no recovery on this basis, because there is no showing that the Government's seizure of the mines caused the loss in operations. *Marion & Rye Valley Railway Co. v. United States*, 270 U. S. 280.

It is not necessary for us to determine what caused the loss, if it is not shown that the Government caused it, but the findings indicate that the loss was caused, not by the Government's seizure, but by bad mining operations, and by reason of the fact that during this period they ran into a "fault" in the coal seam which made operations unprofitable, and, in fact, later caused the abandonment of the mine.

When this fault was discovered plaintiff made its own determination as to whether or not to continue operations in an effort to get through the fault, without any counsel, advice or directions on the part of defendant.

The approved method of operating a coal mine is to drive the entry in as far as it is ever desired to go, and then to work back toward the opening. This is called the "on the retreat" method of operation. Plaintiff, however, worked forward, or as it is expressed, "on the advance." This means that it would drive the entry in part way and begin mining the rooms at once, advancing the entry as the coal was mined. In mining the rooms plaintiff did not leave sufficiently strong pillars of coal to support the roof and it caved in. This made it impossible to drive the entry in further and mine the rest of the coal in the seam. Together
57 with the fault which was encountered, this was probably the cause of the operating loss.

At any rate, the proof fails to show that the loss was caused by the Government's seizure.

In *Marion & Rye Valley Railway Co. v. United States*, *supra*, the plaintiff sought to recover because of the alleged seizure of its railroad by the President on December 26, 1917. On that date the President issued a Proclamation in which he said: "[I] do hereby * * * take possession and assume control at 12 o'clock noon on the twenty-eighth day of December 1917, of each and every system of transportation * * * consisting of railroads * * *" including the plaintiff railroad.

Of the effect on this the court said:

"* * * He did not at any time take over the actual possession or operation of the railroad; did not at any time give any specific

direction as to its management or operation; and did not at any time interfere in any way with its conduct or activities. The company retained possession and continued in the operation of its railroad throughout the period in question. The railroad was operated during the period exactly as it had been before, without change in the manner, method or purpose of operation. The railroad did not serve any military camp; nor did it transport troops or munitions. The character of the traffic remained the same. Nothing appears to have been done by the Director General which could have affected the volume or profitableness of the traffic or have increased the requirements for maintenance or depreciation; and apparently it retained its earnings; expended the same as it saw fit; and, without accounting to the Government, devoted the net operating income to the company's use."

The court held that there could be no recovery "because nothing of value was taken from the company and it was not subjected by the Government to pecuniary loss. Nominal damages are not recoverable in the Court of Claims. *Grant v. United States*, 7 Wall. 331, 338."

As in that case, so in this, nothing of value was taken from the company nor was it subjected by the Government to pecuniary loss, so far as the proof shows.

There is, however, one exception to this: The wage agreement, under which the mines were operated prior to the strike, provided \$20.00 as vacation compensation. The War Labor Board on May 25, 1943, after the Government's seizure of the mines, modified the agreement by authorizing a vacation payment of \$50.00 and the refund of occupational charges like rentals on mine lamps. As we understand, this finding of the War Labor Board was not obligatory on plaintiff, but the Secretary of the Interior, acting through the Solid Fuels Administration, instructed the Operating Managers to carry the Board's decision into effect. Plaintiff did this, as ordered, at a cost to it of \$2,241.26. This is an extra expense of operation occasioned by the Government, for which we think plaintiff is entitled to recover. See *Wheelock Bros., Inc. v. United States*, No. 46982, this day decided. Judgment for this amount will be entered. It is so ordered.

Howell, Judge; Littleton, Judge; and Jones, Chief Judge, concur.

MADDEN, Judge, dissenting.

I am unable to agree with the court's decision. It awards to the plaintiff \$2,241.26 as an extra expense of operation occasioned by the Government. This extra expense consisted of an increased vacation allowance to the plaintiff's workmen, and the refund to

them of occupational charges like rentals on mine lamps. The court has not found that the plaintiff could have operated its mine without making the concessions directed by the War Labor Board, nor has it found what the losses to the plaintiff would have been if the Government had not intervened and the strike had continued. I think that the court is not justified in awarding the plaintiff the amount of these expenditures when it does not and, I think, could not, find that the plaintiff was, in fact, financially harmed by the Government's acts.

The question of whether or not there was a taking by the Government is somewhat more difficult than the similar question in *Wheelock Bros., Inc. v. The United States*, No. 46982, decided today. I am of the impression that there was not a taking, within the meaning of the Constitution, but I think it is unnecessary to decide that question since, as I see it, no harm to the plaintiff has been shown.

59

Judgment of the court

Feb. 6, 1950

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of two thousand two hundred forty-one dollars and twenty-six cents (\$2,241.26).

61

Proceedings after entry of judgment

On March 14, 1950, on motion made therefor and allowed by the court, the defendant filed a motion for a new trial.

On April 3, 1950, the court entered the following order on said motion:

Order

It is ordered this third day of April 1950, that said motion for a new trial be and the same is overruled.

63

[Duly sworn to by jurat omitted in printing.]

Supreme Court of the United States

No. 168, October Term, 1950

Order allowing certiorari

Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.